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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 185

RIN 3206-AN39

Program Fraud Civil Remedies: Civil Monetary Penalty Inflation Adjustment

AGENCY: Office of Personnel Management (OPM).

ACTION: Final rule.

SUMMARY: This rule adjusts the level of civil monetary penalties contained in U.S. Office of Personnel Management regulations implementing the Program Fraud Civil Remedies Act of 1986, with an initial “catch-up” adjustment under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and Office of Management and Budget guidance. It also makes subsequent annual catch up adjustments.

DATES: Effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Sec. 701 of Pub. L. 114-74)(“the Act”). The Act required agencies to: (1) adjust the level of civil monetary penalties with an initial “catch-up”

adjustment through an interim final rulemaking, and (2) make subsequent annual adjustments for inflation. The purpose of these adjustments is to maintain the deterrent effect of civil penalties.

On July 19, 2016, OPM made an initial adjustment to the following civil monetary penalties to carry out the requirements of the 2015 Act, based on instructions found in Office of Management and Budget Memorandum M-16-06:

CFR Citation	Description of the penalty	Current Penalty	Catchup Adjustment	Adjusted Penalty
5 CFR 185.103(a)	Civil Penalty for False Claims	\$5,000	\$5,781	\$10,781
5 CFR 185.103(f)(2)	Civil Penalty for False Statements	\$5,000	\$5,781	\$10,781

That rule took effect on August 1, 2016.

This rule takes into account adjustments for the year 2016 based on inflation for that year. These calculations were made based on guidance contained in Office of Management and Budget Memorandum M-17-11:

CFR Citation	Description of the penalty	Adjusted Penalty	2016 Inflation Adjustment	2016 Inflation Adjusted Amount
5 CFR 185.103(a)	Civil Penalty for False Claims	\$10,781	\$176	\$10,957
5 CFR 185.103(f)(2)	Civil Penalty for False Statements	\$10,781	\$176	\$10,957

This rule makes additional adjustments for the year 2017 based on inflation for that year. These calculations were made based on guidance contained in Office of Management and Budget Memorandum M-18-03:

CFR Citation	Description of the penalty	Adjusted Penalty	2017 Inflation Adjustment	2016 Inflation Adjusted Amount
5 CFR 185.103(a)	Civil Penalty for False Claims	\$10,957	\$223	\$11,181
5 CFR 185.103(f)(2)	Civil Penalty for False Statements	\$10,957	\$223	\$11,181

This final rule is being issued without prior public notice or opportunity for public comments. The 2015 Act's amendments to the Inflation Adjustment Act required the agency to adjust penalties initially through an interim final rulemaking, which did not require the agency to complete a notice and comment process prior to promulgating the interim final rule. The amendments also explicitly required the agency to make subsequent annual adjustments notwithstanding 5 U.S.C. 553 (the section of the Administrative Procedure Act that normally requires agencies to engage in notice and comment). The formula used for adjusting the amount of civil penalties is given by statute, with no discretion provided to OPM regarding the computation of the adjustments. OPM is charged only with performing ministerial computations to determine the amount of adjustment to the civil penalties due to increases in the Consumer Price Index for all Urban Consumers (CPI-U).

II. Calculation of Adjustment

The Office of Management and Budget (OMB) issued guidance on calculating the initial catch-up adjustment. *See* February 24, 2016, Memorandum for the Heads of Executive Departments and Agencies, from Shaun Donovan, Director, Office of Management and Budget, re: *Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015*. Under this guidance, OPM has identified applicable civil monetary penalties and calculated the catch-up adjustment. A civil monetary penalty is any assessment with a dollar amount that is levied for a violation of a Federal civil statute or regulation, and is assessed or enforceable through a civil action in Federal court or an administrative proceeding. A civil monetary penalty does not include a penalty levied for violation of a criminal statute, or fees for services, licenses, permits, or other regulatory review. The calculated catch-up adjustment is based on the percent change between the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October in the year of the

previous adjustment (or in the year of establishment, if no adjustment has been made) and the October 2015 CPI-U.

The Office of Management and Budget published guidance on adjusting penalties based on the increase in the CPI-U between October of 2015 and October of 2016, as well as between October of 2016 and 2017. *See* December 16, 2016, Memorandum for the Heads of Executive Departments and Agencies, from Shaun Donovan, Director, Office of Management and Budget, re: *Implementation of the 2017 annual adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015*; December 15, 2017 Memorandum for the Heads of Executive Departments and Agencies, from Mick Mulvaney, Director, Office of Management and Budget re: *Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015*. This guidance provided OPM with the level to which civil penalties should be adjusted as annual inflation adjustments following the initial necessary update to comply with the 2015 Act. Although OPM published the initial interim final rulemaking to adjust its relevant penalties in compliance with the 2015 Act, OPM has not yet issued the 2017 or 2018 adjustments. As a result, the increases associated with the first two annual inflation adjustments mandated under the 2015 Act after the original adjustment are combined here.

III. Executive Order Requirements

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a not significant regulatory action, under Executive Order 12866. EO 13771

This final rule is not an EO 13771 regulatory action because this rule is not significant under EO 12866.

A. Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities.

The Regulatory Flexibility Act (RFA) requires an agency to prepare a regulatory flexibility analysis for rules unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The RFA applies only to rules for which an agency is required to first publish a proposed rule. See 5 U.S.C. 603(a) and 604(a). The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 *requires* agencies to adjust civil penalties annually. No discretion is allowed. Thus, the RFA does not apply to this final rule.

B. Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

This rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act. This rule:

- (a) Does not have an annual effect on the economy of \$100 million or more.
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises.

C. Unfunded Mandate Reform Act of 1995 (2 U.S.C. 1532)

This rule does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

D. E.O. 12630, Takings.

This rule does not have takings implications.

E. E.O. 13132, Federalism

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles, and responsibilities of State, local, or Tribal governments.

F. E.O. 12988, Civil Justice Reform

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

- (a) Does not unduly burden the judicial system.
- (b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

G. E.O. 13175, Consultation with Indian Tribes

In accordance with Executive Order 13175, OPM has evaluated this rule and determined that it has no tribal implications.

H. Paperwork Reduction Act

This rule does not involve any collections of information subject to the Paperwork Reduction Act of 1995, Public Law 104-13.

List of Subjects in 5 CFR Part 185

Program Fraud Civil Remedies, Claims, Penalties, Basis for Civil Penalties and Assessments.

Office of Personnel Management.

Jeff T.H. Pon,
Director.

For the reasons set forth in the preamble, OPM amends part 185 of title 5 of the Code of Federal Regulations as follows:

**PART 185—PROGRAM FRAUD CIVIL REMEDIES: CIVIL MONETARY PENALTY
INFLATION ADJUSTMENT**

1. The authority citation for part 185 continues to read:

Authority: 28 U.S.C. 2461 note.

§ 185.103 [Amended]

2. Section 185.103 is amended as follows:

- a. In paragraph (a) introductory text, revise “\$10,781” to read “\$11,181”.
- b. In paragraph (f)(2), revise “\$10,781” to read “\$11,181”.

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